NO. 94-903

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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GEORGE DAVID ATKINS, *Petitioner,*
*vs.*
COLTEC INDUSTRIES, INC.,
f/k/a COLT INDUSTRIES, INC.,
and STEMCO, INC., *Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# BRIEF FOR COLTEC INDUSTRIES, INC., f/k/a COLT INDUSTRIES, INC., and STEMCO, INC. IN OPPOSITION

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## I.

## QUESTIONS PRESENTED

1. Whether the Fifth Circuit's holding that, "the evidence presented at trial overwhelmingly demonstrates that the [Respondents] did not discriminate against [Petitioner] on the basis of age," is supported by the record. [Pet. App. at 2]

2. Whether the Fifth Circuit's judgment should be reviewed on writ of certiorari when neither the burden-shifting procedural device nor the issue of pretext was applied by or relied upon by the Fifth Circuit in affirming the district court's judgment as a matter of law in favor of Respondents.

3. Whether the issue of "pretext plus" should be reviewed on writ of certiorari in this case when the Fifth Circuit did not apply any "pretext plus" standard.

4. Whether the issue of "pretext plus" is relevant when a plaintiff in an employment discrimination case fails to offer any evidence disputing an employer's legitimate nondiscriminatory reason for discharging the plaintiff.

## II.

## LIST OF AFFILIATED COMPANIES

***Divisions, Subsidiaries and Parent Company of Coltec Industries, Inc., f/k/a Colt Industries, Inc. and of Stemco, Inc.***

- All of the affiliated companies of Coltec Industries, Inc., f/k/a Colt Industries, Inc. are wholly owned by Coltec Industries, Inc.

- Stemco, Inc. is a wholly-owned company. The only company with which Stemco, Inc. is affiliated that is not wholly owned is Coltec Industries, Inc., which is the parent company that wholly owns the parent company of Stemco, Inc.

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## OPINIONS BELOW

Pursuant to Local Rule 47.5, the Court of Appeals for the Fifth Circuit determined that its opinion affirming the district court should not be published.

5th Cir. R. 47.5. The content of the Fifth Circuit's unpublished opinion, however, is reprinted in the appendix of Petitioner's Petition for Writ of Certiorari. [Pet. App. at 1-12][1]

Likewise, the district court did not publish its memorandum order granting Respondents' motion for judgment as a matter of law. The district court's memorandum order is reprinted in the appendix of Petitioner's Petition for Writ of Certiorari. [Pet. App. 13-26]

## JURISDICTION

Petitioner invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1254 (1).

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1/ Citations to Petitioner's Petition for Writ of Certiorari are referred to as "Pet.," followed by the page number. Citations to the appendix included with the Petition for Writ of Certiorari are referred to as "Pet. App.," followed by page number. Citations to the Record are referred to as "Rec.," followed by the volume and page number of the Record. Citations to Plaintiff's Exhibits are referred to as "PX," and Defendant's Exhibits are referred to as "DX."

## STATEMENT OF THE CASE

### A. *Background Facts.*

This Age in Discrimination Act ("ADEA") case arose out of Stemco Instruments' reduction-in-force that was necessitated by its unsuccessful attempts to market a product line called *AutoCoach*. Coltec Industries, Inc. is the parent company of various Stemco companies and divisions. [Rec. IV at 22, 89] *AutoCoach* was a computer produced by Stemco that was used onboard in commercial trucks. The purpose of *AutoCoach* was to record and monitor driving activities, such as the shift pattern of the driver, the speed of the driver, the number of brake applications, the idle time of a truck's engine, and other such information. [Rec. V at 35-36] By monitoring such activities, *AutoCoach* assisted trucking operations in reducing operating expenses. [Id.]

Stemco marketed *AutoCoach* through two separate avenues: (i) it was sold directly to the customers or end users ("direct sales"); and (ii) it was supplied on a national basis to distributors ("distributor

sales"). [Rec. IV at 75; Rec. VI at 30-33] Distributors were essentially middlemen between Stemco and the ultimate customer for the *AutoCoach*. [Id.] The advantage to Stemco of using distributors was that the distributors maintained their own sales forces to market *AutoCoach*, thereby relieving Stemco from many of the expenses associated with selling the product. [Id.] Through the two avenues of marketing, companies that wanted to utilize the *AutoCoach* could purchase it from a distributor or directly from Stemco. [Id.]

*AutoCoach* suffered from significant engineering and warranty problems. [Rec. IV at 77, 91-93; Rec. V at 42] These engineering and warranty problems largely contributed to Stemco's financial problems. [Rec. IV at 77, 78] For instance, in 1988 Stemco recorded sales of over $5 million, *but suffered a net loss of over $1.8 million*. [Rec. IV 81-82; DX 1] During 1989, the financial problems worsened with *sales decreasing* to $3.54 million and *net losses increasing* to almost $3.1 million. [Rec. IV at 86-88; DX 2]

It was during this period of worsening financial conditions that Stemco hired Petitioner, David Atkins, as its National Sales Manager. [Rec. V at 46] Atkins was 47 years of age at the time he was hired by Stemco in July 1989. [Rec. V at 74] According to Atkins, when he joined Stemco he knew nothing about it or the *AutoCoach* product. [Rec. V at 75] Several months following his employment by Stemco, Atkins became its Director of Sales and Marketing. In that role, Atkins testified that he supervised all of Stemco's salespersons and sales support personnel, and supervised the development of the Company's direct sales marketing plan. [Rec. VI at 35-39]

When Atkins joined Stemco, 70% of its *AutoCoach* sales were distributor sales. [Rec. VI at 32] With no background in distributor sales, much less distributor sales of *AutoCoach*, Atkins focused his attention on direct sales. [Rec. V at 39-41] To this end, Atkins devoted 85% to 90% of his time supervising the Company's salespersons. [Rec. VI at 37-38] Less than seven months after Atkins joined Stemco, and at the

time he was terminated, sales through distributors had decreased from 70% of all sales to 50% of all sales. [Rec. VI at 32]

Because of the financial losses suffered by the Company, in January 1990, Paul Norton was assigned the position of Stemco's president. [Rec. IV at 16, 72, 76, 88] As part of this assignment, John Guffey, who was the President of the Coltec Group, told Norton to take any steps necessary to stop the financial hemorrhaging of Stemco. [Rec. IV at 76, 89] Consequently, Norton was faced with making some tough decisions: should he shut Stemco down? sell it? reorganize it? expand sales? decrease sales? or cease sales? [Rec. IV at 76-77]

To form a better picture of what to do with the Company, Norton first looked at the financial records of the Company to try to get a better idea of where some of the financial problems lay. [Rec. IV at 78] As he reviewed the financial records, Norton discovered, among other things, that the selling expenses for the

product were far out of balance with sales, which was a big concern to Norton. [Rec. IV at 81-91]

Norton then reviewed the Company's warranty records to gain a better idea of the warranty problems. [Rec. IV at 88] Norton also looked at personnel information and talked to the Vice President of Personnel about the employees, their various job functions, and their capabilities. [Rec. IV at 88] Norton's investigation included a meeting with Stemco's Vice President of Finance to discuss the financial condition of the Company. [Rec. IV at 89] After he investigated, Norton concluded that the Company's problems involved engineering defects in its products, and involved selling expenses beyond the level that sales could support. [Rec. IV at 91]

Based on his investigation, in late January or early February 1990, Norton decided to reorganize the Company rather than close it, operate it as usual, or expand it. [Rec. IV at 90] Norton decided against closing the Company because he feared it would adversely affect the relationships between customers

and other Stemco companies. [Rec. IV at 91] In other words, Norton did not want customers to perceive Stemco as having "bailed out" on them. [Id.] Leaving operations "as is" made no sense, considering the enormous losses the Company had been suffering. [Id.]

Norton's decision to reorganize the company and reduce expenses necessarily entailed a workforce reduction -- there simply were too many people to support the level of sales. [Rec. IV at 93] Accordingly, Norton looked to see where the workforce could be reduced. In accomplishing this end, Norton *completely eliminated* Stemco's Finance Department, reducing force by four or five people. [Rec. IV at 94-95] Next, Norton eliminated *all* of the staff or management of the manufacturing arm of Stemco, retaining only the assemblers who actually put the product together. [Rec. IV at 96, 101] Norton reduced force in the Engineering Department because he felt that the company had too many engineers. [Rec. IV at 97-98] Based on the advice of others, Norton retained only the highest ranked

engineers who could best address the *AutoCoach's* engineering problems. [Rec. IV at 98, 101]

Finally, Norton took a look at the sales area, which was headed by Atkins. [Rec. IV at 98] In this connection, Norton concluded that "it was suicide to continue to introduce products that had a problem in the marketplace." [Rec. IV at 99] Because Norton did not know how long it would take to correct the *AutoCoach's* problems, he decided to reduce marketing efforts until the problems were corrected. [Id.] Norton recognized that he could reduce expenses if he eliminated the sales force until such time as the product was ready to be marketed heavily again. [Id.] Norton recognized that he could eliminate the sales force without shutting down the Company by marketing the product strictly through distributors. [Id.] In this way, Norton believed that costs could be reduced, because the distributors maintained their own sales forces, leaving Stemco free of most expenses associated with sales. [Id.]

Although Norton made the decision to reduce the workforce, including elimination of the direct sales function, he sought approval of his decision from his boss, John Guffey. [Rec. IV at 99-101] Guffey did not, however, become involved in identifying the persons and functions to eliminate. [Rec. IV at 100-101] In all, 24 of the approximately 40 Stemco employees were laid off as a consequence of this reorganization. [Rec. at 93, 94, 101] On February 14, 1990, the Personnel Vice President, along with Guffey and Norton, met with the people who were subject to the reduction-in-force to discuss with them the termination of their employment. [Rec. IV at 101-102]

Chris Johns was one of the members of the sales division that was discharged in connection with the reduction-in-force. [Rec. IV at 103] The new Vice President and General Manager, however, suggested to Norton that Johns be retained or rehired to serve as the Company's liaison with distributors. Retaining Johns made sense because of Johns' background and experience dealing with the *AutoCoach* product line

and with distributors. [Rec. IV at 102-105] Johns had worked for one of Stemco's distributors for about three years, and during those three years had gained valuable knowledge and experience selling Stemco's product. [Rec. IV at 105] Accordingly, Johns had the knowledge about the product and needs of *AutoCoach* distributors that enabled him to be the liaison Stemco needed between it and its current distributors. [Rec. IV at 106] In addition, with Johns' knowledge of the product, he could service Stemco's existing customers. [Id.] Johns, however, was not retained to "prospect for new sales." [Id.] With the retention of Johns, he continued to perform essentially the same functions that he had performed prior to the reduction-in-force. [Rec. IV at 105-106] Following the reduction-in-force, there was no sales support activity. [Id.]

The Company never was able to hire any new sales representatives. [Rec. IV at 108] Other employees eventually left the Company, including Johns and the new Vice President and General

Manager. [Id.] Eventually, the product line was sold. [Rec. IV at 203]

During trial, Norton testified unequivocally that age was not a factor in his decision to effect the reduction in force, and it was not a factor in the decision to terminate the employment of Atkins. [Rec. IV at 108, 113] Moreover, age was not a factor in the decision to retain Johns -- Norton had no knowledge of Johns' age and had never even met Johns when it was suggested to and agreed to by Norton that he retain Johns. [Rec. IV at 105-106]

B. ***Proceedings In The Courts Below.***

Because Atkins failed to present legally sufficient evidence such as would meet or support his burden of making a *prima facie* case of age discrimination, at the close of Atkins' evidence, the Company moved for judgment as a matter of law under Rule 50, FED.R.CIV.P. [Rec. VI at 89] In response to the Company's motion, the district court stated that it did "not think there [was] much evidence supporting the plaintiff's claim in this case." [Rec. VI at 94]

Nonetheless, the district court denied the motion and elected to let the case proceed, stating, "if a verdict were returned by the jury in favor of Mr. Atkins [the Court] might yet be able to reach that point [of entering judgment as a matter of law], but [] having this much time invested in the case, it seem[ed] to [the Court] that it would be much more prudent for [it] to make a full record so that the jury which [ha]d been impanelled [could] render its decision in the case." [Id.]

Knowing that Atkins failed to meet his burden under the ADEA, Stemco went ahead and rested without calling any witnesses. [Rec. VI at 97] The jury returned its verdict in which it found age a determining factor in the Company's decision to discharge Atkins, but did not find that Stemco willfully violated the ADEA. [Rec. II at 330, 333]

Because the facts and evidence presented at trial so wholly failed to support any notion of ADEA violations, and because the evidence was legally insufficient to support the jury's verdict, the Company, at the invitation of the district court, renewed its

motion for judgment as a matter of law. [Rec. II at 227] This time, the district court granted the motion and entered judgment as a matter of law against Atkins. [Rec. II at 385, 398]

In an unpublished opinion, the Fifth Circuit affirmed the district court's judgment in favor of Respondents, finding that "the evidence presented at trial overwhelmingly demonstrates that the defendants did not discriminate against Atkins on the basis of age...." [Pet. App. at 2] In reaching this conclusion, the Fifth Circuit stated that because the case was fully tried, there was no need to review it under the burden-shifting procedural devices relied upon typically in its review of appeals from summary judgments. [Pet. App. at 7] Rather, the Fifth Circuit looked at the record as a whole "to determine whether the record contain[ed] evidence upon which a reasonable fact-finder could have concluded that Atkins proved by a preponderance of the evidence that Stemco intentionally discriminated against him on the basis of age when it discharged him." [Id.]

## SUMMARY OF THE REASONS THE PETITION SHOULD BE DENIED

### A. *The Fifth Circuit Did Not Resort To Analyzing This Case From Any Burden-Shifting Procedural Device, And Thus Never Reached The Issue Of Pretext Or Pretext Plus.*

Atkins states that the Fifth Circuit arrived at its unpublished decision in this case by misapplying a "pretext plus" standard, a standard that he contends has been rejected by courts of appeals in other circuits. [Pet. at 10-20] To arrive at such a contention, Atkins ignores the content of the Fifth Circuit's opinion, wherein the Fifth Circuit not only did not reach or address any issue of pretext or pretext plus, it expressly stated that a fully-tried case such as this *would not* be reviewed under such burden-shifting procedures. [Pet. App. at 7]

There is a reason for Atkins' mischaracterization of the Fifth Circuit's opinion, however -- he is attempting to create an impression on the part of this Court that the Fifth Circuit's unpublished opinion represents a split in authority among the circuits. Whether any such split actually exists among the

circuits with respect to the issue of pretext or pretext plus, however, has no relevance with respect to *this* case because the Fifth Circuit and the district court did not address the issue of pretext. [Pet. App. at 7 & 18] Rather, as the Fifth Circuit stated, its review of this fully-tried case was based on "whether the record ... contain[ed] evidence upon which a reasonable fact-finder would have concluded that Atkins proved by a preponderance of the evidence that Stemco intentionally discriminated against him on the basis of age when it discharged him." [Pet. App. at 7]

### B. *As Found By The Fifth Circuit, The Evidence Overwhelmingly Demonstrated That Respondents Did Not Discriminate Against Atkins On The Basis Of Age.*

The undisputed evidence presented at the trial of this case reveals that Stemco eliminated Atkins' position and terminated Atkins' employment in connection with a reorganization that resulted in a company-wide reduction-in-force of 57% of the total employees. Likewise, it was undisputed that the significant financial losses suffered by Stemco for a two-year period were the reason for the reorganization. It

was undisputed that the Company completely eliminated its Sales Division, among other divisions and positions as part of its reorganization. It was undisputed that Atkins managed the sales division prior to the reorganization and that he had nothing to manage when his division was eliminated.

These undisputed facts gave rise to the Company's undisputed legitimate nondiscriminatory reason for Atkins' discharge: business necessities forced the Company to undergo a company-wide reduction-in-force that included eliminating the Company's Sales Division. [Rec. II at 13; Pet. App. at 7; Pet. App. at 14] With the elimination of the Company's Sales Division and with the Company's decision to discontinue direct sales for an indefinite period of time, there was no need for Atkins' job function. [Rec. II at 109; Pet. App. at 54] Atkins *never* disputed the fact that the Company's need for his position and efforts ended with the elimination

of the sales division.[2] Rather, he offered irrelevant and insignificant facts and "statistics" that he claims demonstrates that age was a determining factor in the decision to terminate his employment. Atkins offered these insignificant and irrelevant "facts" and "statistics" as evidence of discrimination notwithstanding that the reorganization completely eliminated the need for his employment and notwithstanding that he *never* identified another *available* position to which he claims he was qualified to fill.[3] [See generally the *Testimony of George David Atkins* at Rec. V at 31 *through* 79 & Rec. VI at 3 *through* 88]

The evidence offered by Atkins to support his claim of age discrimination can be summarized as

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2/ Atkins suggests that the Company should not have eliminated the sales division or resorted to relying on distributor sales instead of direct sales. [Pet. at 5] The ADEA, however, cannot be used to second guess business decisions. *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1267 (1992).

3/ Johns' position was not an available position in that the Company simply recalled Johns to perform the same job he had held prior to the reorganization.

follows: (i) the average age of the workforce decreased when the Company reduced its force from 40 employees to about 15 employees; (ii) the Company rehired or retained a 40-year old employee to work as a liaison between the Company and its distributors; and (iii) an executive, who did not select the employees to lay off, allegedly remarked that if *Atkins* were to purchase the Company, *Atkins* could save costs by eliminating the costlier older workers. [Pet. 3-10] None of this evidence was legally sufficient to support his claim that age, rather than business necessities, served as the reason for his termination.

C. ***Conclusion.***

In short, Atkins' Petition should be denied because: (i) the record fully supports the Fifth Circuit's judgment affirming the district court's judgment as a matter of law in favor of Respondents; and (ii) the Fifth Circuit's opinion in this case does not represent an application of any standard, pretext or otherwise, that diverges with the standards applied by the courts of appeals in other circuits.

## REASONS WHY THE PETITION SHOULD BE DENIED

### A. *Because The Fifth Circuit Did Not Apply A "Pretext Plus" Standard, This Case Fails To Present A Proper Basis For Addressing Any Alleged Split In Authority.*

Because this case was fully tried, the Fifth Circuit declined to review it from the standpoint of burden-shifting. [Pet. App. at 7] Rather, the Fifth Circuit stated that its job was "to determine whether the record before [it] contain[ed] evidence upon which a reasonable fact-finder could have concluded that Atkins proved by a preponderance of the evidence that Stemco intentionally discriminated against him on the basis of his age when it discharged him." [Pet. App. at 7] Having declined to review the case under a burden-shifting procedural device, the Fifth Circuit had no need to address the final step applied when using such a device: an analysis of pretext.

What the Fifth Circuit *did* do in this case is provide to the parties a description of the procedural burden-shifting steps applicable in Title VII and ADEA cases. [Pet. App. at 6-7] This background description of the burden-shifting steps, however, was provided by the

Fifth Circuit strictly as background information. [Id.] As part of this background discussion, the Fifth Circuit quoted the burden of proof placed on a plaintiff in a Title VII or ADEA case as set forth in *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993): " '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. at 2747[.]" [Pet. App. at 6-7]

The Fifth Circuit's background discussion included a quotation from its opinion in *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993). *Bodenheimer* represented an appeal from a *summary judgment* in an ADEA case. In *Bodenheimer*, the Fifth Circuit interpreted *St. Mary's Honor Center v. Hicks* as requiring Title VII and ADEA plaintiffs to, "prove through a preponderance of the evidence, that the employer's reasons were not the true reason[s] for the employment decision *and* that unlawful discrimination was." [Pet. App. at 6-7 (emphasis in original)]

Having provided this background information, the Fifth Circuit stated that, like the district court, it would *assume* that Atkins satisfied his *prima facie* case.[4] [Pet. App. at 7 & 18] Moreover, the Fifth Circuit recognized that the Company "rebutted [Atkins'] inference by providing a legitimate nondiscriminatory reason for Atkins' discharge -- that is, restructuring because of the company's poor performance reflected by its increasing financial losses over a two-year period." [Pet. App. at 7]

The Fifth Circuit then announced that a fully-tried case such as this one need not be reviewed under a burden-shifting procedure. Consequently, the court reviewed the case to see "whether the record before [it] contain[ed] evidence upon which a reasonable fact-finder could have concluded that Atkins proved by a

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[4] Contrary to Atkins' assertion to this Court in footnote 2, page 13 of his Petition, neither the district court nor the Fifth Circuit found that Atkins satisfied his *prima facie* burden. Instead, the district court and the Fifth Circuit simply *assumed* for the purposes of their decisions that Atkins satisfied his *prima facie* case. [Pet. App. at 7 &18]

preponderance of the evidence that Stemco intentionally discriminated against him on the basis of his age when it discharged him." [Pet. App. at 7] In other words, the Fifth Circuit described the burden-shifting procedural devices applicable in Title VII and ADEA cases, but turned around and stated that such devices were unnecessary in this case because, unlike *Bodenheimer*, this case had been fully tried.

Notwithstanding the express and clear statement made by the Fifth Circuit that it would not review this case under a *St. Mary's* or *Bodenheimer* burden-shifting analysis, Atkins makes the remarkable claim that the Fifth Circuit did precisely that: that it evaluated the case using the *Bodenheimer* interpretation of *St. Mary's*. [Pet. at 10-11] The *Bodenheimer* interpretation of *St. Mary's*, according to Atkins, involved an improper application of a pretext plus standard. [Pet. at 11] Atkins further contends that *Bodenheimer* not only was a misapplication of *St. Mary's*, but that the Fifth Circuit's interpretation of *St. Mary's* in *Bodenheimer*

was rejected by courts of appeals in other circuits. [Pet. at 14-17]

Atkins' argument might leave room for some consideration except that he is not petitioning for a writ of certiorari in *Bodenheimer* -- he is seeking a writ in *his* (this) case. *Atkins'* case, moreover, does not involve the Fifth Circuit's application of the *Bodenheimer* interpretation of *St. Mary's*. At no point in the Fifth Circuit's opinion did the issues of *St. Mary's* or the *Bodenheimer* interpretation of *St. Mary's* ever come up -- that is, issues involving the credibility, or lack thereof, of Respondents' nondiscriminatory reasons for terminating Atkins' employment. At no point in time did the Fifth Circuit discuss or analyze this case from the standpoint of pretext or pretext plus -- it simply reviewed the entire record and concluded that "the evidence presented at trial overwhelmingly demonstrate[d] that the defendants did not discriminate against Atkins on the basis of age." [Pet. App. at 2]

That the Fifth Circuit quoted from and cited to *St. Mary's Honor Center* and *Bodenheimer* as part of its background discussion does not support Atkins' theory that the Fifth Circuit evaluated the evidence from the standpoint of *Bodenheimer's* interpretation of *St. Mary's*. *Bodenheimer* did not involve a fully tried case -- it involved an appeal from a *summary judgment* in an ADEA action. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d at 956. An appeal from a summary judgment in an ADEA or Title VII action lends itself very well to a burden-shifting analysis, whereas an appeal from a fully-tried case is better reviewed from the standpoint of considering the entire record.

*St. Mary's*, moreover, involved a Title VII bench trial to a district court, where the district court concluded that a plaintiff's discharge was not racially motivated notwithstanding the district court's *express* finding that the reasons given by the employer for the discharge were not the real reasons for its termination of the plaintiff's employment. *St. Mary's Honor Center v. Hicks*, __ U.S. at __, 113 S.Ct. at 2748.

Unlike the Court in *St. Mary's*, the Fifth Circuit in this case was not faced with a situation where a trier of fact expressed disbelief of Respondents' legitimate nondiscriminatory reason for discharging Atkins. To the contrary, the district court found that "[Atkins'] indirect proof [of age discrimination] is barely enough to establish a *prima facie* case, and certainly [is] not enough to rebut Stemco's legitimate nondiscriminatory reasons for the reduction-in-force." [Pet. App. at 25] Moreover, the Fifth Circuit labeled Respondents' economic justifications for the layoff, "objective and undeniable."[5] [Pet. App. at 12]

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[5] Even if the Fifth Circuit had engaged in an unnecessary analysis under a burden-shifting approach, because it determined the Company's reasons for terminating Atkins were undeniable, the issue of whether to apply a standard of mere pretext as opposed to a pretext-plus standard never would have been reached. Moreover, regardless of how *St. Mary's* is interpreted, had the burden-shifting analysis been undertaken, Atkins was required to prove " 'that the [Company] intentionally discriminated against [Atkins] because of his [age].' " *St. Mary's Honor Center v. Hicks*, __ U.S. at __, 113 S. Ct. at 2749, *quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981). And

(footnote continued on next page)

Atkins states, however, that the jury must have disbelieved Respondents' legitimate nondiscriminatory reasons for terminating Atkins' employment because it returned a verdict against Respondents. [Pet. at 13] If a jury's affirmative finding of discrimination amounts to conclusive evidence of pretext, Title VII and ADEA defendants may as well forfeit their appellate rights.

The fact is, because the district court and Fifth Circuit did not need to resort to a burden-shifting analysis in this case, the issues of pretext or pretext plus were not relevant to the analyses of these courts. One can rest assured, however, that had either court found reason to question the credibility or truthfulness

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(footnote continued from previous page)

> while proof of pretext together with the elements of a plaintiff's *prima facie* case may suffice to show intentional discrimination, a failure to prove pretext is fatal to a plaintiff's cause of action. *St. Mary's Honor Center v. Hicks*, __ U.S. at __, 113 S. Ct. at 2749. Under no circumstances, however, does proof of pretext alone compel a judgment for a plaintiff. *Id.* In this case, Atkins presented no legally sufficient evidence of pretext. Thus, even if the Fifth Circuit had engaged in a burden-shifting analysis, Atkins could derive no benefit from any inferences that this Court recognized in *St. Mary's*.

of Respondents' legitimate nondiscriminatory reason for terminating Atkins, such questions would have been added to the the courts' analyses of the evidence. Because there was no doubt as to the truth of Respondents' reason for terminating Atkins, credibility questions were raised or discussed. To be sure, a review of Atkins' Petition and of the record in the case reveal quite clearly his complete inability to dispute Respondents' reasons for his discharge.

### B. *The Evidence Presented At Trial Overwhelmingly Demonstrated That Respondents Did Not Discriminate Against Atkins On The Basis Of Age.*

Even if the Fifth Circuit had engaged in the burden-shifting procedural device, the issue of whether to apply a "pretext plus" standard never would have been reached because Atkins simply did not have legally sufficient evidence of pretext. To be sure, the Company's legitimate nondiscriminatory reason for terminating Atkins was undisputed. It was undisputed that the Company suffered severe financial losses for the two-year period preceding Atkins' termination. [Rec. IV at 81-82, 86-88; DX 1; DX 2] It was undisputed

that the Company reduced its force by about 57% because of the financial losses. Eleven of the persons terminated were under the age of 40, and twelve of the persons terminated were over the age of 40. [DX 17; PX 85; PX 1; Rec. IV at 93] It was undisputed that the Company's Sales Division was eliminated and all eight members employed in the Sales Division, which Atkins managed, were discharged. [DX 17; PX 85; PX 1; Rec. IV at 100-101] It was undisputed that 50% of the terminated members of the Sales Division were over the age of 40, and 50% were under the age of 40. [Id.]

It was undisputed that the Company rehired only one member of the sales force, Chris Johns. [Rec. IV at 105] Johns, who was over the age of 40, was rehired not to engage in direct sales, which was Atkins' area of expertise, but to serve as a liaison between the Company and its distributors. [PX 85; Rec. IV at 70, 106] It is undisputed that Johns performed essentially the same job before the layoff as he performed after the

layoff.[6] [Rec. IV at 105-106] Atkins never claimed that he was clearly more qualified than Johns for Johns' position[7] [Pet. App. at 9], and it was undisputed that Johns was in fact clearly better qualified than Atkins to fill the role as a liaison between the Company and its

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6/ In his Petition, Atkins represents to this Court that Johns was retained to fill the position of "Distribution Sales Manager." [Pet. at 5] The record citations presented by Atkins to this Court do not support such a representation. Moreover, the record clearly reveals that Johns did not hold a title of manager, but was a salesman *to the distributors*. [Rec. IV at 105]

7/ Atkins does not argue that he was clearly better qualified than Johns for Johns' position. Atkins never even testified that he wanted Johns' position. Rather, Atkins contends that the retention of Johns represented further evidence of discrimination because Paul Norton, the Company's new President, was unfamiliar with Johns and Johns' background. Accordingly, Atkins surmises that Norton must have used age as the basis for his decision to retain Johns. Atkins fails to further explain to this Court, however, that the evidence reveals Norton made the decision to retain Johns based on a request of the Company's new Vice President and General Manager that Johns be retained. [Rec. IV at 102-105] This new Vice President and General Manager was familiar with and impressed by Johns' background and experience. Norton, moreover, had never met Johns and had no idea of Johns' age. [Rec. IV at 105]

distributors.[8] *Walther v. Lone Star Gas Co.*, 952 F.2d at 123 (evidence must show plaintiff *clearly* better qualified than younger employee who was retained -- "[t]he ADEA was not intended to be a vehicle for judicial second guessing of business decisions, nor was

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8/ The position to which Johns was retained to perform was limited to managing distributors. [Rec. IV at 56-57] Johns interfaced with the distributor groups who sold the *AutoCoach*. [Rec. IV at 57] The undisputed evidence revealed that Johns previously worked several years for a major distributor of the *AutoCoach* product line and that Johns had acquired considerable experience in marketing *AutoCoach* products during that period of time. [Rec. IV at 105-106; Rec. VI at 31-32, 48-52] Uncontroverted testimony also revealed that Johns possessed not only a thorough understanding of the distribution sales network, but of the *AutoCoach* product line. [Rec. IV at 102-105] Even Atkins agreed that Johns was one of the few people in the company who had worked for a distributor that had sold a lot of the *AutoCoach* products. [Rec. VI at 48-52]

Compare these qualifications to those of Atkins. Atkins joined Stemco only seven months before the company-wide reduction-in-force, and when he joined Stemco, he knew nothing about it or the *AutoCoach* product line. Moreover, Atkins had never worked for a distributor in this industry. [Rec. V at 74-75] Atkins never performed Johns' job, namely handling the distributor sales of the *AutoCoach* product line. [Id.] Atkins focused on direct sales throughout his entire career and testified that direct sales were his focus while he was employed at Stemco.

it intended to transform the courts into personnel managers.")

It was undisputed that the company-wide reduction-in-force resulted in the elimination not only of *all* employees in the Company's sales division, but of *all* employees in the Company's Finance Department. [Rec. IV at 94-95] This company-wide reduction-in-force also included the termination of *all* staff and management members in the Company's Manufacturing Division, and included several members of the Engineering Department. [Rec. IV. at 95-96, 97-98, 101]

Against these undisputed facts, all Atkins offers to support his claim of discrimination is second guessing and statistically insignificant comparisons of the workforce's age before and after the company-wide reduction. In this context, Atkins nitpicked at the Company's lists of terminated and retained employees. [Rec. IV at 27-28, 32, 39, 43, 46, 49, 67-70, 94, 111, 109; Rec. V at 7-10, 16, 65-66] This nitpicking takes the form, for instance, of Atkins complaining on the one

hand that Johns, who was over 40, was not included on the list of terminated employees,[9] yet on the other hand complaining that the rehiring of Johns within a day or so of the layoff represented evidence of age discrimination. [Rec. IV at 41, 43, 61-62; Rec. at 6-7] Atkins takes issue with the fact that an individual who was not an employee of Stemco, but of an affiliated company, was not included on the layoff list. [Rec. IV at 43-44] Atkins takes issue with the Company's decision to retain or rehire another employee under the age of 40 even though the employee had no association with the Sales Division.[10] [Rec. IV at 43]

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9/ Atkins suggests that the Company failed to include Johns on the layoff list so as dishonestly to decrease the number of people over the age of 40 who were laid off. [Rec. IV at 41-42; Pet. App. at 33-35]

10/ In his Petition, Atkins claims that "several other younger employees were terminated and quickly rehired, specifically Chris Johns and Petra Rhode." [Pet. 4] Atkins fails to mention that Ms. Rhode was not an employee of the Sales Division. Other than Johns and Rhode, Atkins fails to identify any other "younger employee" whom the Company rehired. Moreover, Atkins fails to mention the fact that an "older" employee, who was a senior engineer, was also recalled or rehired.

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Even though all eight members of the sales division were laid off, 50% of whom were under the age of 40, and even though about 24 of the 40 members of the entire workforce were laid off (eleven of the twenty-four employees being under the age of 40), Atkins argues that it is statistically significant that the age of the workforce declined after the layoff. Atkins can only make such an argument by ignoring the following undisputed surrounding facts and circumstances: the Company eliminated entire divisions, including the division that Atkins managed; the Company eliminated 57% of its very small workforce;[11] the Company laid off

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[Rec. V at 63]

Even though Atkins considered it evidence of pretext when Johns' name was included on a list of those persons retained by the Company (because Johns was over the age of 40), Atkins found no problem including the name of another employee on the same list who was under the age of 40 and who, like Johns, had been rehired following her termination. [Rec. V at 59-60]

11/ Considering that 57% of the small workforce was laid off, leaving only 16 or so employees, it would have been nothing short of impossible for the

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all eight members of its sales division -- four of whom were over the age of 40 and four of whom were under the age of 40. The usefulness of statistics "depends on all of the surrounding facts and circumstances." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340, 97 S. Ct. 1843, 1856 (1977). The surrounding circumstances and undisputed facts in this case rendered Atkins' statistics meaningless and useless.

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> Company to have approached the layoff with maintenance of the employees' ages in mind. Stemco laid off *all* employees in its finance and sales divisions. To maintain the age of the workforce, should Stemco have retained the older members of sales and finance even though Stemco no longer had jobs for them to perform? Should Stemco have laid off its better engineers so as to preserve the age of the workforce if the better engineers were younger? Would it have made sense for Stemco to have retained management and staff in its manufacturing arm and discharge its needed assemblers simply to maintain the older age of its workforce? Atkins offers no solutions to these questions and never disputes the fact that Stemco had legitimate nondiscriminatory reasons for its 23 other layoffs -- only that *his* termination was discriminatory and the statistics "prove" it.

Atkins finally takes issue with a statement allegedly made by John Guffey, the Coltec Group President. According to Atkins, Guffey offered him the following advice: if Atkins and other members of Stemco's management were successful in buying Stemco, Atkins would need to reduce his negative cash flow, and one way of accomplishing that goal would be to "get rid of the older workers because they cost the most because they had the highest benefits, most wages."[12] [Rec. V at 51] Such a statement is not probative of age discrimination because it was not related to the decision to terminate *Atkins*.

Moreover, the evidence conclusively established that Stemco's President, Paul Norton, made the decision to eliminate the entire sales division. [Rec. IV at 100-101] It was Norton's decision that led to the discharge of Atkins, and the decision was made in response to financial conditions that were unrelated to any age-based characteristics of the individual

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12/ Before the reorganization, Atkins and other members of management discussed buying the Company.

members of the groups laid off. Atkins offered no evidence that Guffey played any role in deciding who was to be terminated, or that Norton, the person who made the layoff decisions, had any knowledge of Guffey's alleged statement.[13] Under the ADEA, the only determinative factor is the motivation of the person who made the termination decision. *See Guthrie*

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13/ Atkins takes issue with an interrogatory answer in which Guffey and Norton were assigned credit for the layoff decisions. [Rec. IV at 100-101, 110, Pet. at 6-7] The interrogatory answer was verified by a corporate secretary. At trial, Norton explained very clearly that because Guffey was his boss, he sought Guffey's approval of Norton's reorganizational plan, which included the company-wide reduction-in-force. [Rec. IV at 100-101] There was no evidence that Guffey played any role, however, in deciding who was to be laid off. In fact, Norton testified unequivocally that Norton and Norton alone made the decisions as to who would stay and who would go. [Rec. IV at 100-101] Norton and Norton alone made the decision as to which divisions would stay and which would go. [Id.] Considering that Norton was the person who made the termination decisions, he knew best how the decisions were made, who was involved in the decisions, and the extent of each person's involvement in the decisions. There was nothing dishonest in Norton's explanation of his exclusive role in the termination decisions nor in his explanation of Guffey's role in approving the reorganizational plan, which included the company-wide reduction-in-force.

*v. Tifco Indus.*, 941 F.2d at 379; *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1412 (7th Cir. 1984).

In addition, as the Fifth Circuit recognized, Guffey's alleged statement related to seniority -- not age. [Pet. App. at 11] Decisions based on seniority do not equate to age discrimination. *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. Unit B 1981), *cert. denied*, 455 U. S. 943, 102 S. Ct. 1439 (1982). Because Atkins was hired only a few months before he was terminated as part of the Company reorganization, he could hardly claim to be a senior employee with the Company.

Finally, Atkins offers as "evidence" of pretext his claim that at the time of his termination, Guffey told him that the Company was closing. [Pet. at 12] Because the Company did not close, Atkins seems to suggest that the Company's stated reason for his termination was untrue. In other words, Atkins seems to be saying that he can define for the Company its legitimate nondiscriminatory reason for his

termination and then disprove the reason offered by him on behalf of the Company. Atkins cites no authority for this novel and very plaintiff-friendly idea, nor will he find any such support. At best, the alleged statement goes to Guffey's credibility. Considering that Guffey did not make the decisions concerning the layoffs, the alleged statement has no relevance.

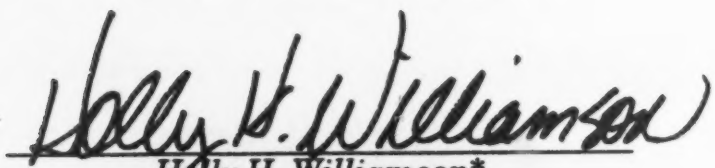
## CONCLUSION

Atkins' attempt to mischaracterize this case as one in which the Fifth Circuit improperly applied a pretext plus standard fails for numerous reasons, not the least of which is the fact that the Fifth Circuit did not apply a pretext plus standard. Moreover, it is nothing short of incredible that Atkins would claim that his alleged showing of pretext was sufficient to create an inference of intentional age discrimination when the record reveals that Atkins never offered legally sufficient evidence from which even an inference of pretext could be drawn. The Company's legitimate nondiscriminatory reason for terminating Atkins' employment is undisputed -- financial problems

forced the Company to reduce dramatically its workforce. Thus, under any standard, the evidence "overwhelmingly demonstrate[d] that the defendants did not discriminate against Atkins on the basis of age." [Pet. App. at 2]

For these reasons, review of this case by the Court is not warranted and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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## PROOF OF SERVICE

Holly H. Williamson, Andrews & Kurth L.L.P., deposes and states that she served this Brief in Opposition to Writ of Certiorari on the Petitioner by enclosing three copies of each thereof in an envelope, certified mail, return receipt requested, addressed to:

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and by depositing same in the United States mail at Houston, Texas, on the *6th* day of *January, 1995.* Holly H. Williamson further deposes and states that all parties required to be served have been served.

Holly H. Williamson